

X  
**FILED**  
DEC 22 2009  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
09 DEC 22 PM 3:16  
BY RONALD R. CARPENTER  
CLERK

NO. 83771-6

---

**SUPREME COURT OF THE STATE OF WASHINGTON**

---

UNION ELEVATOR & WAREHOUSE COMPANY, INC.,  
a Washington Corporation,

Respondent,

v.

THE STATE OF WASHINGTON, by and through the Department of  
Transportation,

Petitioner.

---

**STATE OF WASHINGTON'S REPLY TO ANSWER TO PETITION  
FOR REVIEW**

---

ROBERT M. MCKENNA  
Attorney General

AMANDA G. PHILY  
Assistant Attorney General  
WSBA No. 37667  
P.O. Box 40113  
Olympia, WA 98504-0113  
(360) 753-1622

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATEMENT OF THE ISSUES.....	1
III.	RESTATEMENT OF THE CASE.....	2
	A. Statutory Framework .....	2
	B. Factual and Procedural Background .....	5
IV.	REASONS WHY REVIEW SHOULD BE DENIED .....	5
	A. Union Elevator Fails To Show That The Court Of Appeals' Decision Satisfies Any Of The Criteria For Granting Review. ....	5
	B. An Administrative Rule Cannot Authorize An Award Of Attorney Fees. ....	6
	C. The Decision Of The Court Of Appeals To Deny Attorney Fees Does Not Conflict With WAC 468-100- 105.....	7
V.	CONCLUSION .....	9

## TABLE OF AUTHORITIES

### Cases

<i>Labriola v. Pollard Group, Inc.</i> , 152 Wn.2d 828, 100 P.3d 791 (2004).....	6, 7
<i>Municipality of Metropolitan Seattle, King County v. Kenmore Properties, Inc.</i> , 67 Wn.2d 923, 410 P.2d 790 (1966).....	3

### Statutes

RCW 4.84.350 .....	4, 6, 9
RCW 8.04.010 .....	2
RCW 8.04.110 .....	2
RCW 8.04.120 .....	3
RCW 8.04.130 .....	3
RCW 8.25.020 .....	7
RCW 8.25.070 .....	7
RCW 8.25.070(1).....	3
RCW 8.25.075 .....	3, 7, 8
RCW 8.25.075(1)(a) .....	8
RCW 8.25.075(1)(b) .....	8
RCW 8.25.075(2).....	8
RCW 8.25.075(3).....	8
RCW 8.25.075(4).....	8

RCW 8.26 .....	4, 7
RCW 8.26.010(4).....	4
RCW 8.26.210 .....	7
RCW 34.05 .....	4

### **Other Authorities**

6A <i>Washington Pattern Jury Instructions: Civil</i> 150.03 (2009) (WPI) .....	3
--	---

### **Rules**

RAP 13.4(b) .....	1, 5, 9
-------------------	---------

### **Regulations**

WAC 10-08 .....	4
WAC 468-10 .....	4
WAC 468-100 .....	7
WAC 468-100-001 .....	7
WAC 468-100-010(1) .....	4
WAC 468-100-105 .....	passim
WAC 468-100-207 .....	4

## **I. INTRODUCTION**

The superior court awarded Union Elevator & Warehouse Company, Inc. (Union Elevator) its maximum statutory attorney fee under the Equal Access to Justice Act (EAJA), and the Washington State Department of Transportation (WSDOT) is not contesting that award of attorney fee. In its answer to WSDOT's Petition for Review, however, Union Elevator argues that the court of appeals erred by not relying on WAC 468-100-105 as authority for awarding additional attorney fees.

The law in Washington is well-settled that an administrative rule cannot establish a right to receive attorney fees. Apart from the EAJA, no other statute authorizes the payment of attorney fees in the circumstances presented by this case, as the court of appeals correctly held. Because Union Elevator raises no argument that would justify review under RAP 13.4(b), this court should decline Union Elevator's request to review the award of attorney fees.

## **II. RESTATEMENT OF THE ISSUES**

1. Should the court grant review of the award of attorney fees when Union Elevator's asserted basis for review does not meet any of the criteria set forth in RAP 13.4(b)?

2. Should the court grant review of the court of appeals' refusal to award additional attorney fees absent statutory authority for doing so?

### **III. RESTATEMENT OF THE CASE**

#### **A. Statutory Framework**

Union Elevator contends that a claim for relocation assistance and the subsequent appeal and judicial review of WSDOT's decision to deny such a claim is a condemnation proceeding. An overview of the differences between condemnation proceedings for the acquisition of real property and the administrative procedures governing claims for relocation assistance will help to demonstrate how an agency's determination of eligibility for and payment of relocation assistance is a proceeding separate and distinct from a condemnation proceeding.

#### Condemnation actions

When WSDOT seeks to acquire real property by condemnation, it must file a condemnation petition in the superior court of the county in which the property is located. RCW 8.04.010. The owner of the real property is entitled to just compensation, or the fair market value, for the property acquired. The amount of just compensation is determined by a jury or the court at trial. RCW 8.04.110. The sole issue considered by the jury or court is the amount of just compensation due for the acquisition of

the owner's real property. 6A *Washington Pattern Jury Instructions: Civil* 150.03 (2009) (WPI). See also *Municipality of Metropolitan Seattle, King County v. Kenmore Properties, Inc.*, 67 Wn.2d 923, 931, 410 P.2d 790 (1966) ("the sole issue for the jury's determination in a condemnation case is the amount of just compensation to be awarded for the property taken or damaged"). After a verdict is reached, the court enters judgment and a decree of appropriation vesting title to the real property in the State. RCW 8.04.120.

The court shall award the owner reasonable attorney fees after a trial is held to determine the amount of just compensation if 1) WSDOT fails to make a written settlement offer at least 30 days prior to trial, or 2) the judgment awarded as a result of trial exceeds WSDOT's 30-day offer by ten percent or more. RCW 8.25.070(1). After paying the amount of damages, fees and costs into court, WSDOT is released and discharged from any and all further liability therefore. RCW 8.04.130.<sup>1</sup>

---

<sup>1</sup> If a property owner believes that WSDOT took his or her property for a public use without first paying just compensation, the owner may file an inverse condemnation action. As in direct condemnation actions, a jury or the court determines the amount of just compensation, if any, due to the property owner at trial. If the jury or court awards just compensation to the property owner claiming inverse condemnation, the court is required to award the owner reasonable attorney fees, if the judgment awarded to the plaintiff as a result of trial exceeds by ten percent or more the highest written settlement offer submitted by WSDOT to the plaintiff at least thirty days prior to trial. RCW 8.25.075.

### Relocation assistance

While just compensation is the fair market value of the real property taken, relocation assistance provides additional payments to persons displaced as the direct result of a public works program for things like moving and business reestablishment expenses.<sup>2</sup> Not every person whose real property is acquired by condemnation is eligible for relocation assistance – only displaced persons are eligible. A displaced person may file a claim for relocation assistance with WSDOT. WAC 468-100-207.

If the claim for relocation assistance is denied, the displaced person may file a written notice of appeal with WSDOT. WAC 468-100-010(1). Appeals of agency actions by WSDOT denying a claim for relocation assistance are governed by the Administrative Procedure Act (APA), RCW 34.05, and WAC 468-10 and WAC 10-08. If an appeal is requested, an adjudicative proceeding is held before an Administrative Law Judge (ALJ). Either party may seek judicial review, under the standards in the APA. If the displaced person prevails in judicial review, he or she is entitled to attorney fees under the Equal Access to Justice Act (EAJA). RCW 4.84.350.

---

<sup>2</sup> RCW 8.26.010(4) provides that relocation assistance provided under RCW 8.26 is not to be considered part of just compensation for a condemnation: “Nothing in this chapter may be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately before March 16, 1988.”



## **B. Factual and Procedural Background**

Union Elevator submitted a claim for relocation assistance to WSDOT for the cost to move certain items of equipment. Clerk's Papers (CP) at 3, 5, 97, 303-318. WSDOT denied that claim on the basis that the items were fixtures, not personal property, and therefore not statutorily eligible for relocation assistance. CP at 18, 98-100, 103, 303-318. WSDOT's denial was upheld in an adjudicative proceeding. CP at 38-43. Union Elevator successfully appealed under the APA; the court of appeals awarded Union Elevator \$25,000 for attorney fees pursuant to the EAJA, the maximum allowed. CP at 407-417.

## **IV. REASONS WHY REVIEW SHOULD BE DENIED**

### **A. Union Elevator Fails To Show That The Court Of Appeals' Decision Satisfies Any Of The Criteria For Granting Review.**

RAP 13.4(b) sets out the standard for accepting issues for review:

A petition for review will be accepted by the Supreme Court only (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Union Elevator does not claim that any of the criteria set forth in RAP 13.4(b) apply to the attorney fee issue. Rather, it contends only that

the decision of the court of appeals conflicts with WAC 468-100-105. Since Union Elevator fails to show that the court of appeals' decision satisfies any of the criteria for granting review, the court should not accept review.

**B. An Administrative Rule Cannot Authorize An Award Of Attorney Fees.**

The trial court awarded Union Elevator the statutory maximum attorney fees under the EAJA, RCW 4.84.350. Union Elevator argues that a higher attorney fee award is authorized by WAC 468-100-105, and it maintains the court of appeals erred by not relying on the administrative rule to order additional attorney fees.

As Union Elevator acknowledges, however, attorney fees and costs may be awarded in Washington only if authorized by contract, statute, or a recognized ground in equity. *See* Union Elevator's Answer to Petition for Review at 15 (citing *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004)). An agency cannot establish by rule its own authority to pay attorney fees from public funds. Accordingly, WAC 468-100-105 cannot constitute authority to pay attorney fees. Even if Union Elevator were correct that the court of appeals' decision conflicts with WAC 468-100-105, and WSDOT does not concede any conflict, WAC 468-100-105 simply cannot authorize the payment of attorney fees.

**C. The Decision Of The Court Of Appeals To Deny Attorney Fees Does Not Conflict With WAC 468-100-105.**

The decision of the court of appeals does not conflict with WAC 468-100-105. WAC 468-100 was adopted to implement RCW 8.26 and is subordinate to the statute. *See* WAC 468-100-001.<sup>3</sup> The only provision in RCW 8.26 that addresses attorney fees is RCW 8.26.210, which provides no authority for awarding attorney fees in relocation proceedings. That section simply cross references RCW 8.25.070 and .075, which authorize attorney fees—with an array of conditions and limitations—in condemnation proceedings. As the court of appeals accurately pointed out, both RCW 8.25.070 and .075 explicitly address only condemnation proceedings; neither statute has any relevance to relocation benefits. *Labriola*, 152 Wn. App. 199, 209-10.

WAC 468-100-105 cross references RCW 8.25.020 and .075 (but not RCW 8.25.070). RCW 8.25.020 does not address attorney fees at all; it authorizes payment to defray the property owner's costs of evaluating a

---

<sup>3</sup> WAC 468-100-001 provides in part:

(1) This chapter promulgates rules to implement RCW 8.26 (Relocation assistance – Real property acquisition policy).

(2) Conflict: In the event of any conflict between these regulations and the provisions of RCW 8.26 or any other applicable law, the statutory provisions are controlling.

...

condemnor's offer. RCW 8.25.075 authorizes a superior court to award attorney fees in three specifically limited situations:

- where the superior court having jurisdiction over a condemnation proceeding rules that the condemnor cannot acquire the real property by condemnation (RCW 8.25.075(1)(a));
- where the condemnor abandons a condemnation proceeding over which the superior court has jurisdiction (RCW 8.25.075(1)(b));
- where the superior court renders judgment awarding compensation for the taking or damaging of real property in an inverse condemnation proceeding, if the judgment exceeds by at least ten percent the highest written settlement offer submitted in writing by the acquiring agency at least 30 days prior to trial (RCW 8.25.075(3)).

RCW 8.25.075(2) authorizes an attorney representing the acquiring agency to include attorney fees in a settlement offer. RCW 8.25.075(4) imposes limits on the calculation of reasonable attorney fees.

In short, neither WAC 468-100-105 nor RCW 8.25.075 apply to appeals or judicial review of the denial of claims for relocation assistance. Rather, it is the EAJA that provides for the award of attorney fees when a party prevails in judicial review of the agency action denying a claim for relocation benefits. Union Elevator sought judicial review of WSDOT's agency action to deny a claim for relocation assistance. Since they prevailed, Union Elevator was entitled to an award of attorney fees

pursuant to the EAJA. RCW 4.84.350. The court of appeals correctly awarded attorney fees to Union Elevator in accordance with the EAJA.

**V. CONCLUSION**

Union Elevator does not claim that the attorney fee issue meets any of the criteria set forth in RAP 13.4(b). Further, its argument that WAC 468-100-105 authorizes additional attorney fees conflicts with settled law. Therefore, this court should deny Union Elevator's request for review of the court of appeals' decision to deny additional attorney fees.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of December, 2009.

ROBERT M. MCKENNA  
Attorney General



AMANDA G. PHILLY, WSBA No. 37667  
Assistant Attorney General  
P.O. Box 40113  
Olympia, WA 98504-0113  
(360) 753-1622

Attorney for Petitioner